

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

STEVEN C. B.,

Plaintiff,

v.

Civil Action No.
5:22-CV-0177 (DEP)

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

OFFICE OF PETER W.
ANTONOWICZ
148 West Dominick Street
Rome, NY 13440

PETER W. ANTONOWICZ, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
OFFICE OF GENERAL COUNSEL
6401 Security Boulevard
Baltimore, MD 21235

HUGH DUN RAPPAPORT, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on February 7, 2023, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

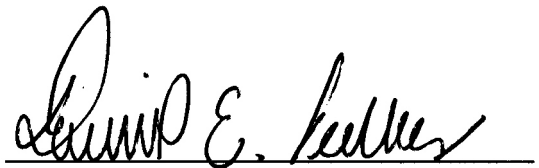
ORDERED, as follows:

1) Defendant’s motion for judgment on the pleadings is
GRANTED.

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: February 24, 2023
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----X
STEVEN C. B.

Plaintiff,

vs.

5:22cv00177

KILOLO KIJAKAZI,
ACTING COMMISSIONER of the SOCIAL
SECURITY ADMINISTRATION,

Defendant.
-----X

Transcript of a Decision from a Teleconference
Hearing held on February 7, 2023, at the Alexander
Pirnie Federal Building, 10 Broad Street, Utica,
New York, the HONORABLE DAVID E. PEEBLES, Magistrate
Judge, Presiding.

A P P E A R A N C E S

For Plaintiff: ANTONOWICZ GROUP
148 West Dominick Street
Rome, New York 13440
BY: PETER W. ANTONOWICZ, ESQ.
(via teleconference)

For Defendant: UNITED STATES ATTORNEY'S OFFICE
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BY: HUGH DUN RAPPAPORT, ESQ.
(via teleconference)

*Lisa M. Mazzei, RPR
Official United States Court Reporter
10 Broad Street
Utica, New York 13501
(315) 266-1176*

1 (The following is an excerpt of a
2 teleconference hearing held on 2/07/23.)

3 THE COURT: All right. Thank you. Let me begin by
4 expressing the Court's thanks to the attorneys for excellent
5 and spirited presentations. The Plaintiff has commenced this
6 proceeding pursuant to 42 United States Code, Sections 405(g)
7 and 1383(c)(3) to challenge an adverse determination by the
8 Acting Commissioner of Social Security. The background is as
9 follows:

10 The Plaintiff was born in June of 1971. He is
11 currently 51 years of age. He was 45 years old at the
12 alleged onset date of disability, which he contends is
13 August 1, 2016. Plaintiff stands 5-foot-7-inches in height.
14 He weighs 185 pounds, approximately. He lives in Liverpool
15 with a fiancée and her daughter. Plaintiff attended regular
16 classes through the tenth grade and did achieve a GED. He is
17 right-hand dominant.

18 Plaintiff stopped working in August of 2016.
19 He worked as a convenience store clerk for one month, but his
20 principal job was as a crane inspector and mechanic. He also
21 has worked in the past as a janitor and testified that he has
22 done some heavy handyman work.

23 Physically, plaintiff suffers from cervical
24 and lumbar back injuries and issues, an injury to his left
25 thumb and right hand, elbow issues which have been described

1 as arthritic epicondylitis. He has undergone or suffered
2 several accidents. In July of 2010, he was involved in a
3 crane accident that caused injury to his cervical spine. It
4 resulted in surgery at the C4-5 level in July of 2011. In
5 July of 2019, Plaintiff injured his left thumb in a table saw
6 accident. And in December of 2019, he experienced a
7 snowblower accident resulting in amputation of his right
8 middle and right ring fingers, partially, and a third broken
9 finger, his right index finger.

10 Mentally, Plaintiff appears to suffer from
11 depression and anxiety which has been treated by his primary
12 physician only with no specialized psychiatric or
13 psychological treatment or hospitalization, and those
14 conditions appear to be well controlled through the use of
15 medications.

16 Plaintiff treats with Dr. Laura Martin. He
17 has also treated at Upstate Orthopedics with Dr. Jon Loftus
18 and Physician's Assistant Allison Lewis and CNY Spine & Pain
19 Medicine, as well as SOS, which is an orthopedic treatment
20 provider.

21 In terms of activities of daily living,
22 Plaintiff can meet his personal needs. He can cook, shop,
23 dress, shower, watch television, listen to the radio, read.
24 He is or was at one point an active weightlifter. He
25 obviously, prior to his accidents, was able to use a table

1 saw and snowblower and can do other light chores.

2 Procedurally, Plaintiff applied for Title 2
3 and Title 16 benefits on November 16, 2017. That date
4 obviously predates the two, 2019 events. He claimed at that
5 time to be disabled due to neck injury, injury to both
6 ankles, a lower back issue and elbow injury. A hearing was
7 conducted on April 15, 2021, by Administrative Law Judge
8 Charles Woode. The administrative law judge issued an
9 adverse determination on May 4, 2021. That became a final
10 determination of the Social Security Administration on
11 February 1, 2022, and the Social Security Appeals Council
12 denied Plaintiff's application for a review. This action was
13 commenced on February 25, 2022, and is timely.

14 In his decision, ALJ Woode applied the
15 familiar five-step sequential test for determining
16 disability. He first noted that Plaintiff's last date of
17 insured status was December 31, 2019. He found that
18 Plaintiff had not engaged in substantial gainful activity
19 since his alleged onset date. At step two, the
20 administrative law judge concluded that Plaintiff suffers
21 from severe impairment that imposed more than minimal
22 limitations on his ability to perform basic work functions,
23 including hypertension, lumbar disc disease, obesity,
24 degenerative joint disease, injury to the left thumb and
25 partial amputations of two fingers of the right hand. He

1 rejected several other impairments as not being severe,
2 including carpal tunnel syndrome, epicondylitis, tarsal
3 tunnel syndrome, as well as Plaintiff's depression and
4 anxiety.

5 He did note, however, that while other
6 impairments were rejected at step two, they were nonetheless
7 considered when the administrative law judge determined
8 plaintiff's residual functional capacity or RFC. At step
9 three, the administrative law judge concluded the Plaintiff's
10 conditions do not meet or medically equal any of the listed
11 presumptively disabling conditions set forth in the
12 commissioner's regulations. Specifically, considering
13 listings 1.15, 1.16, 1.18, 1.20, 11.14 and 4.04. He also
14 considered Plaintiff's obesity and pain in formulating his
15 residual functional capacity.

16 After surveying all of the available evidence,
17 the administrative law judge concluded that Plaintiff is
18 capable of performing light work with additional limitations,
19 including significantly that he can lift or carry 10 pounds
20 with the right upper extremity and can occasionally handle,
21 finger or feel with the right hand. There are other
22 limitations that are due to physical impairments, but those
23 are the limitations that are germane to this case. Except
24 for the ALJ concluded the Plaintiff is unable to perform his
25 past relevant work as a cashier, inspector and construction

1 equipment mechanic.

2 At step five, the ALJ found based on the
3 testimony of the vocational expert that Plaintiff is capable
4 of performing available work in the national economy,
5 notwithstanding his impairments, and cited representative
6 positions of bus monitor, children's attendant and usher, and
7 therefore concluded that Plaintiff was not disabled at the
8 relevant times.

9 As you know, the Court's function in this case
10 is extremely limited and the standard to be applied is
11 exceedingly deferential. I must determine whether correct
12 legal principles were applied and the result is supported by
13 substantial evidence which is defined as such relevant
14 evidence as a reasonable person would find sufficient to
15 support a conclusion.

16 The Second Circuit has noted on many occasions
17 that this is a rigorous standard for a plaintiff to meet. In
18 *Brault v. Social Security Administration*, 683 F.3d 443 from
19 the Second Circuit 2012, the Second Circuit noted that the
20 standard is even more stringent than the clearly erroneous
21 standard and observed that under the substantial evidence
22 standard, once an ALJ finds a fact, that fact can be rejected
23 only if a reasonable fact finder would have to conclude
24 otherwise. The standard was reiterated more recently in
25 *Schillo v. Kijakazi*, 31 F.4th 64 from April 6, 2022, from the

1 Second Circuit Court of Appeals.

2 In this case, the Plaintiff raises two
3 arguments. First, contending that the ALJ was obligated to
4 order a new consultative examination based upon the
5 snowblower accident of December of 2019. Specifically, to
6 address the effects on Plaintiff's ability to manipulate with
7 the right-dominant hand, he also argues that the step two
8 determination is incomplete and should have included a right
9 index finger injury and left elbow condition as severe at
10 step two.

11 The medical opinions in the record from the --
12 all predate, it is true, the 2019 events. There is a medical
13 opinion from state agency consultant Dr. M. Angelotti from
14 February of 2018. And there is an opinion from
15 Dr. Myra Shayevitz from January of 2018.

16 The regulations concerning the acquisition of
17 a consultative examination are found, in part, in 20 C.F.R.
18 Section 404.1519(a). And that also is for Title 16 purposes
19 included in 20 C.F.R. Section 416.969(a). They provide, in
20 relevant part, we may purchase a consultative examination to
21 try to resolve an inconsistency in the evidence or when the
22 evidence as a whole is insufficient to allow us to make a
23 determination or decision on your claim.

24 They give examples, and one example is as
25 follows from subsection (b) (4). There is an indication of a

1 change in your condition which in this case is true. But it
2 goes on to say that it is likely to affect your ability to
3 work, but the current severity of your impairment is not
4 established.

5 In this case, as I indicated, the RFC limits
6 Plaintiff's ability to lift and carry with the right upper
7 extremity to 10 pounds and to only occasional handling,
8 fingering and feeling with the right hand. The vocational
9 expert in this case testified to -- in response to several
10 hypotheticals, the third of which is spot on with the
11 residual functional capacity and led to the VE's testimony of
12 the availability of the three jobs that the ALJ found the
13 Plaintiff capable of performing. The Plaintiff through step
14 four in the residual functional capacity portion is obligated
15 to come forward with evidence to show limitations on the
16 ability to perform basic work functions. In this case, the
17 record was held open for that purpose. The record contains
18 evidence which was specifically discussed by the
19 administrative law judge concerning Plaintiff's right index
20 finger treatment and healing. Page 727 references healing.
21 Page 735 indicates good range of motion. And there is record
22 evidence of progress with physical therapy. And, of course,
23 there is also Plaintiff's activities of daily living, which
24 are inconsistent with such a limitation as the Plaintiff now
25 appears to claim.

1 The Plaintiff's lawyer did not identify any
2 record gaps when asked and stated no objection to the
3 evidence in the record. Under these circumstances, I find no
4 error. *Krach v. Commissioner of Social Security*, 2014
5 Westlaw 5290368. *Jason C. v.* -- that's from the Northern
6 District of New York, October 15, 2014. *The Jason C. v.*
7 *Berryhill* at 2019 Westlaw 1409804 from the Northern District
8 of New York, March 28, 2019. And *Bruce Wayne C. v.*
9 *Commissioner of Security*, 2022 Westlaw 1304024, Northern
10 District of New York, May 2, 2022. I find no abuse of
11 discretion in the administrative law judge's failure to order
12 a subsequent consultative examination before deciding the
13 case.

14 The second point concerns the step two
15 determination under the governing of regulations. An
16 impairment or a combination of impairments is not severe if
17 it does not significantly limit claimant's physical or mental
18 ability to do basic work activities, 20 C.F.R. Section
19 404.1521(a). And the term "basic work activities" is defined
20 to include the abilities and aptitudes necessary to do most
21 jobs.

22 There is no question that the burden at step
23 two is de minimus, but it clearly is the Plaintiff's burden
24 to establish an impairment that precludes performance of
25 basic work activities and it's well-accepted that the mere

1 presence of a disease or impairment or establishing that a
2 person has been diagnosed or treated for a disease or an
3 impairment is not by itself sufficient to establish the
4 condition as severe.

5 In terms of the right index finger, there is
6 no evidence in the record that Plaintiff has adduced that
7 would show a limitation from the right index finger on the
8 ability to perform basic work activities. The ALJ did
9 reference the index finger issue and discussed it at page 19
10 and 20. He did state at page 13 that in formulating the
11 residual functional capacity, he considered all the
12 Plaintiff's impairments. And at page 16, he stated that he
13 accommodated the -- at page 16, the RFC accommodated the
14 finger issue by limiting Plaintiff to occasionally handling,
15 fingering or feeling with the right extremity and restricting
16 lifting with the right upper extremity.

17 I don't find that the Plaintiff has carried
18 its burden of establishing an impairment at step two based on
19 his right index finger that would be severe. But in any
20 event, if there was error, it's harmless, since the
21 Plaintiff -- since the administrative law judge did go on to
22 consider that injury and take it into account in the RFC.

23 The left elbow injury was also discussed. The
24 ALJ discussed the modest findings and the fact that Plaintiff
25 received injections, at page 13. Plaintiff did not establish

1 any evidence that would show a limitation to the ability to
2 perform the residual functional capacity -- well, consistent
3 with residual functional capacity. And although it was not
4 found to be a severe condition at step two, the
5 administrative law judge, nonetheless, did consider the left
6 elbow condition at subsequent stages. It was considered at
7 step three. It was described as mild at page 21. And at one
8 point, the Plaintiff denied treatment or declined treatment
9 for his elbow at March 2020. That's at 749 in the records
10 from SOS and stated that the left elbow condition was not
11 that bothersome. So, again, I find that the Plaintiff has
12 not established error at step two. And if there was error,
13 it was harmless.

14 As the -- at step five, the vocational expert
15 was presented with a hypothetical that tracked the residual
16 functioning capacity and found that Plaintiff is capable of
17 performing available work in the national economy. As the
18 Commissioner points out, he was specifically asked, the
19 vocational expert, whether there would be still jobs
20 available if the individual could use his dominant hand for
21 less than occasional handling, fingering or feeling. That's
22 at page 80. And the vocational expert stated that the bus
23 monitor position would still remain. So any error, once
24 again, appears to be harmless. Plaintiff has not established
25 prejudice.

1 So for these reasons, I find that the correct
2 legal principles were applied and substantial evidence
3 supports the resulting determination. I will therefore grant
4 judgment on the pleadings to the Defendant and order
5 dismissal of Plaintiff's complaint.

6 Thank you, both. I hope you have a good rest
7 of the day.

8 MR. RAPPAPORT: Thank you, your Honor.

9 MR. ANTONOWICZ: Thank you, your Honor.

10 (Court adjourned, 11:45 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, LISA M. MAZZEI, RPR, Official U.S. Court
Reporter, in and for the United States District
Court for the Northern District of New York, DO
HEREBY CERTIFY that pursuant to Section 753, Title
28, United States Code, that the foregoing is a true
and correct transcript of the stenographically
reported teleconference proceedings held in the
above-entitled matter and that the transcript page format is
in conformance with the regulations of the Judicial
Conference of the United States.

Dated this 23rd day of February, 2023.

/S/ LISA M. MAZZEI

LISA M. MAZZEI, RPR
Official U.S. Court Reporter

LISA M. MAZZEI, RPR
Official U.S. Court Reporter